UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

QUICKWAY TRANSPORTATION, INC.

and Cases 09-CA-251857
09-CA-254584
09-CA-255813
09-CA-257750
09-CA-257961
09-CA-270326
09-CA-272813

GEOFFREY BRUMMETT,
An Individual

DONALD RAY HENDRICKS
An Individual

WARREN TOOLEY,
An Individual

BRENT WILSON,
An Individual

GENERAL DRIVERS, WAREHOUSEMEN AND
HELPERS, LOCAL UNION NO. 89,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Daniel Goode, Esq., for the General Counsel.
Eddie Wayland, Seth Granda, Stephen Stovall, Esqs., *(King & Barlow, Nashville, Tennessee),*
Keith D. Frazier, Darius Walker, Jr., Esqs., *(Ogletree, Deakins, Nash, Smoak, & Stewart, PC, Nashville, Tennessee)* for the Respondent.
Ed Gleason, Esq*, Branstetter, Stranch & Jennings, PLLC, Cincinnati, Ohio)* for the Charging Party.

DECISION

STATEMENT (OVERVIEW) OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried via Zoom video technology on August 16, September 13-15, 16 and October 1, 27 and 28, 2021. The first charge in this matter was filed by Geoffrey Brummett on November 15, 2019. The charges related to the closing of Respondent's Louisville operations on December 9, 2020 were filed by Brent Wilson on December 15, 2020 and by the Union on February 12, 2021. The General Counsel issued a consolidated complaint on May 25, 2021.

The heart of this case involves events culminating on December 9, 2020 when Respondent, Quickway Transportation, Inc., voluntarily resigned from its carrier services agreement with the Kroger Supermarket Company for performance of services at Kroger's Louisville (KY) Distribution Center (the KDC).[1] It then discharged or laid off all its employees at the KDC and at satellite facilities in Versailles and Franklin, Kentucky. The General Counsel alleges that Respondent violated Section 8(a)(5) and (3) and (1) in doing so. For the reasons stated below, I conclude that this complaint item must be dismissed pursuant to the U.S. Supreme Court decision in *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965).

The case also involves a number of alleged Section 8(a)(1) violations that occurred in 2019 and earlier in 2020. These were settled in September 2020, Jt. Exh. 5.[2] In light of the alleged violations committed in December 2020, the General Counsel set aside the settlement of the 2019 and earlier 2020 allegations and reinstituted its allegations that Respondent's conduct violated Section 8(a)(1) and in one case Section 8(a)(4) and (1). Since the Region set aside the settlement on the basis of the alleged violation in withdrawing from Louisville, I find that the Region was not justified in setting aside the settlement and dismiss these complaint allegations as well.

However, there were several violations which emanated from materials produced by Respondent to the General Counsel pursuant to subpoenas issued in preparation for this hearing. For reasons also discussed herein I find Section 8(a)(1) violations that were not covered by the settlement agreement.

On the entire record,[3] including my observation of the demeanor of the witnesses,[4] and

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[1] Technically Kroger's contract was with a sister company, Quickway Logistics, which had a contract with Quickway Transportation, Inc. Both companies are affiliates of Paladin Capital.

[2] The Acting Regional Director approved the settlement on September 16, 2020, Jt. Exh. 5.

[3] Tr. 339, line 21 should be Wayland, not Gleason.
Tr. 383, line 12, mutual should be neutral.
Tr. 406, line 12: If should be unless.
Tr. 898, line 22 " the president" should be "those present."

[4] While I have considered witness demeanor, I have not relied upon it in making any credibility determinations. Instead, I have credited conflicting testimony based upon the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Panelrama Centers,* 296 NLRB 711, fn. 1 (1989)

after considering the briefs filed by the General Counsel, Respondent,[5] and Charging Party Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with headquarters in Nashville, Tennessee, transports grocery products from facilities in many different states, including Kentucky, Indiana, Tennessee, Ohio and Michigan. Quickway Transportation, Inc. is one of several affiliates of Paladin Capital, a holding company. In the year prior to May 1, 2021,[6] Quickway Transportation, Inc. performed services valued in excess of $50,000 for customers outside of Kentucky. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union. Local 89 of the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

As stated previously, Quickway Transportation, Inc. is an affiliate of Paladin Capital. It and/or other Paladin affiliates have contracts to haul groceries from Kroger facilities, as well as other companies, in various states. At some Kroger facilities, such as the one at Shelbyville, Indiana, Respondent performs services for Kroger without a contract. At some Kroger facilities, the Paladin affiliate is the primary carrier; at others it is a secondary carrier. It may also be a dedicated carrier, meaning it services only Kroger at this facility.

At the Kentucky Distribution Center (KDC) in Louisville, Quickway was a secondary carrier to Transerv [or Transervice], whose drivers were also represented by Teamsters Local 89. At most of its unionized terminals, Quickway is the primary trucking carrier. At the KDC, Quickway received orders to carry Kroger products from Transerv. JB Hunt trucking company also delivered Kroger products from the Louisville terminal. Transerv transported 50-60% of the Kroger product from KDC, employing about 100 drivers. Quickway employed about 60-63 drivers to transport most of the rest of the KDC product.[7] These drivers occasionally transported Kroger product from other Quickway terminals. Local 89 also represents about 600 warehouse employees at the KDC who work for Zenith Logistics.

William Prevost, who is Chief Executive Officer of the Quickway companies and Paladin Capital, started with Respondent in 2004, as did Chris Cannon, the current vice-president of operations. When Prevost and Cannon took over Respondent, employees at 4 of its current

[5] Respondent filed 2 post-trial briefs by different law firms. One brief addressed the allegations that were settled and in which the settlement was set aside by the Region. The other addressed the events in late 2020 leading to Respondent's withdrawal from its contract with Kroger.

[6] Other affiliates within the Paladin Group are Quickway Carriers, Quickway Services, Quickway Logistics, which enters into contracts with companies such as Kroger to provide transportation services, Capital City Leasing (CCL) which owns the truck cabs and other equipment used by the transportation affiliates.

[7] The KDC services 242 Kroger stores in various states.

terminals were represented by Teamster Union locals.[8] Respondent has maintained a relationship with those locals up to the present day, except the one in Indianapolis which was decertified in 2008.[9] With the exception of the Louisville and Landover, Maryland terminals, none of Respondent's terminals have been organized during the tenures of Prevost and Cannon.

Quickway began servicing Kroger in Louisville in 2014. The most recent Carrier Services Agreement between Kroger and Quickway regarding the Louisville terminal was set to expire on February 3, 2021. In 2014, Quickway purchased the business of Mala Trucking company from Ed Marcellino. Marcellino stayed with Quickway as a vice-president until January 2020, when Respondent terminated him.

Quickway operated out of a facility on English Station Road which was about 9 miles from the main KDC warehouse, where the Transervice trucks were parked. The KDC warehouse employees worked for Zenith Logistics, which has a collective bargaining agreement with Local 89, as does Transervice.

The English Station Road property was jointly leased from Lamar Properties, by Respondent and Paladin affiliate Capital City Leasing per a lease that runs from 2014 to 2024. Mechanics employed by Capital City Leasing worked out of the same facility as the Quickway drivers until February 2021, 2 months after Respondent withdrew from its agreement with Kroger and laid off all of its Louisville employees.. Respondent began to attempt to sublease this property in February 2021 and succeeded in doing so in September 2021.[10]

Local 89 began an organizing drive at Quickway's KDC operation in the summer of 2019. Quickway's Vice President of Operations, Chris Cannon, became aware of this no later than August 2019 and most likely earlier. He instructed VP Ed Marcellino, then Quickway's senior on-site representative at KDC, that Respondent needed to find out if the Quickway drivers were being pushed to sign union authorization cards, G.C. Exh. 48.[11]

2019 and 2020 allegations that were settled and then vacated by the General Counsel and other evidence bearing on anti-union animus or violative conduct occurring prior to December 2020

Warren Tooley, a pro-union former Quickway driver, testified about statements made on July 27, 2019, in the dispatcher's office at the KDC. Kerry Evola, then the Respondent's

[8] The unionized terminals are in Livonia, Michigan (Teamsters Local 164), Lynchburg, VA (Local 171), Shelbyville, Indiana (Local 135) and Landover, MD (Local 639). The Landover terminal, which does not service Kroger, was organized in 2006. In connection with the Landover campaign, Respondent was found to have violated the Act by engaging in the surveillance of employees' union activities, coercively interrogating employees, refusing to reinstate unfair labor practice strikers, locking out employees, engaging in direct dealing and transferring bargaining unit work by unilaterally removing employees from the bargaining unit, *Quickway Transportation, Inc.,* 354 NLRB 560 (No. 80), (2009); reaffd. 355 NLRB 678 (2010).

[9] Teamsters Local 135 tried unsuccessfully to organize the Indianapolis terminal again in 2019.

[10] Whether and under what terms Respondent could cancel the sublease are not reflected in this record.

[11] Marcellino reported to Cannon.

operations manager,[12] stated in front of several employees, that if Quickway at the KDC were to go union, that Bill Prevost, the CEO of Paladin Capital and Quickway, would shut the facility down. Evola testified that he did not make such a statement.[13]

Given his commission of documented unfair labor practices, which he could not deny, I discredit Evola's testimony and credit Tooley. Moreover, regardless of whether he heard from Prevost that Respondent would not tolerate another unionized terminal, such a statement is not inconsistent with Respondent's history. In addition to the violations alleged in the complaint, Evola photographed union stickers on the personal trucks of Quickway drivers at some point in time, Tr. 677-78.

Donald Hendricks, a former dispatcher for Quickway, testified that in August 2019, Ed Marcellino, then Quickway's vice-president of Operations, [14]asked him to give Marcellino a list of union supporters at the KDC, and that he intended to put a stop to the union organizing. Marcellino denies this.[15] I credit Hendricks to the extent that Marcellino asked him for a list indicating which employees were inclined to vote for unionization. This is consistent with Respondent's conduct with regard to the 2019 Indianapolis representation election. It is also consistent with Marcellino's email of August 12, 2019 in which he indicates that he is having his son spy on union activity, G.C. Exh. 48.

Warren Tooley also testified that sometime in 2019, then terminal manager Chris Higgins told employees that if Quickway employees unionized, the company would have to raise its prices and might lose its contract with Kroger. Higgins, who Respondent fired in June 2020, denies this allegation.[16] I credit Tooley. Higgins' total lack of familiarity or total disregard of employee rights is evident from his interrogation of dispatcher Michael Jenkins and other dispatchers about how they intended to vote in a representation election for a bargaining unit of dispatchers, G.C. Exh. 31.

On October 10, 2019, Chris Cannon sent an email to Ed Marcellino and others which reads in part, "In recent days and weeks I have asked about any union talk and the reply has been "no talk about union". It is very apparent we still have union talk in our Louisville terminal and this needs to be addressed very quickly." G.C. Exh. 11.

On November 1, 2019, Cannon emailed other managers with regard to the representation election in Indianapolis which was scheduled later that month involving Teamsters Local 135. That email establishes that Respondent was keeping a list of each drivers' likely vote.

In a conversation secretly recorded by driver Brent Wilson, Kerry Evola told employees on January 24, 2020, that if they selected the Union as their bargaining representative, Respondent would cease making contribution to the employee stock plan (ESOP).[17]

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[12] Respondent either terminated Evola in June 2020 or he resigned because he expected to be terminated. Tooley currently works as a driver at the KDC for another employer.

[13] This is alleged to be a violation of Section 8(a) (1) in complaint paragraph 5(a).

[14] Respondent terminated Marcellino in January 2020.

[15] Complaint paragraph 6.

[16] Complaint paragraph 7 (a).

[17] Complaint paragraph 7(b).

Chris Higgins sent an email to Chris Cannon and HR Director Randy Harris on January 31, 2000, which attached photos of employees' private vehicles which displayed Local 89 stickers, G.C. Exh. 14. Higgins was the Quickway terminal manager in Louisville at this time. Thus, Kerry Evola was not the only Quickway manager engaging in surveillance of employees' union activities. Since there is no evidence that either Cannon or Harris expressed disapproval of this spying, I infer they approved of it and may have authorized it.

In February 2000, Respondent considered and may have implemented discipline less severe on a driver because he "is one of the few drivers at the Louisville terminal who is not supporting the union cause." Eric Hill, a Quickway manager, wrote that "Perhaps in light of the circumstances only a written warning for this offense with probationary period and if this happens again a three day suspension followed by termination if it happens a third time. In light of the unusual circumstances with the Union." G.C. Exh. 16.

The complaint alleges that on about March 9, 2020, Operations Manager Kerry Evola told employee Brent Wilson that he was going to file a lawsuit against him. In February 2020, Wilson had filed an NLRB unfair labor practice charge alleging that Respondent, by Evola, had violated the Act. In March, Wilson recorded a conversation with Evola in which Evola told him "You said I was gonna, uh, retaliate against you if you said something to the Union, you went to the Labor Board about it, yeah you did, so, when it's all over, make sure you've got an attorney, because I'm coming back…"[18]

On March 11, 2020, Chris Cannon sent an email to William Prevost recommending that Quickway hire the Labor Relations Institute. Prevost approved engaging this firm. In his email, Cannon set forth the reasons for this engagement, R. Exhs. 67 and 68:

> Both companies [Labor Relations Institute and another] are considered as "union busters" and have a 90% win vote for the company during the election.
>
> The advantage of using these companies is they have the legal right to say what our company cannot say during a union campaign. During a union campaign, Quickway is restricted to not talk about the negative effects if the drivers form a union such as decreased pay and benefits, loss of business, drivers rights being taken away, any fees or penalties a driver can face from the union, etc. …They also educate our office staff on what to say and what not to say during campaigns so we can avoid additional ULP charges….Considering the force of the union, Randy [Harris, Paladin's HR director] and I would like the allowance to use either of the two companies to help keep our Louisville terminal non-union.

This email not only evidences anti-union animus, but indicates a willingness to violate Section 8(a)(1) of the Act through the agency of LRI.

On March 22, 2020, Lori Brown, Respondent's office manager in Louisville, took notes of a conversation amongst 3 Quickway drivers about whether there were any advantages to being represented by the Union. Brown sent her notes to Chris Higgins, then the terminal manager and

[18] Complaint paragraph 8

operations vice-president Chris Cannon. Cannon instructed Higgins as follows: "Let Lori know to observe and take notes of the conversations. She does not need to engage and ask questions as she did." G.C. Exh. 22. At trial, the General Counsel moved to conform the pleadings to the evidence by alleging illegal surveillance on the part of Cannon.

On May 28, 2020, Chris Cannon advised subordinates as follows:

> I'd like to disconnect any and all Murfreesboro drivers from picking up loads from the KDC. Any Murfreesboro driver that comes on the lot at the KDC is being approached by the union, and we certainly do not want the union to infect our Murfreesboro fleet.

G.C. Exh. 25, pg. 3.

Quickway drivers from the Kroger facility in Murfreesboro, Tennessee, as well as from Indianapolis picked up loads from the KDC, Tr. 290-292. In May 2020 Respondent shifted work from its Murfreesboro drivers to the Louisville drivers precisely for the purpose of avoiding a union campaign in Murfreesboro, G.C. 25, Tr. 1717-18.

In June 2020, Bill Prevost suggested to Chris Cannon and Randy Harris, the Paladin HR director, that Kroger could have loads towed from the KDC to the Quickway yard in order to prevent the Teamsters from picketing at the KDC. There is no evidence whether this was explored in December 2020, as a means of limiting the impact of a strike against Quickway, G.C. Exh. 30.

On September 14, 2020, 2 drivers asked terminal manager Jeff McCurry[19] if the terminal would close if the Union was voted in. McCurry responded by saying that he could not speak for Kroger but that he was unaware of any location where there were 2 union carriers at a Kroger distribution center. R. Exh. 76.

On September 18, 2020, the Union demonstrated in front of the Quickway facility at the Kentucky State Fairgrounds. The Union displayed a "Fat Cat" balloon at the site. Interim terminal manager Jeff McCurry went outside the terminal and photographed the Union representatives and the "Fat Cat." McCurry informed his superiors, including Chris Cannon, the VP of Operations, that he would attempt to find out what the union representatives were discussing with Quickway drivers, G.C. Exh. 34.

A few hours later, McCurry reported, "as far as what they were discussing with drivers, all of the drivers I spoke with shut them down. The drivers that were coming in this morning were not interested in talking with the union," G.C. Exh. 35. At trial, the General Counsel moved to conform the pleadings to the evidence by alleging illegal surveillance and interrogation on the part of Respondent.

On September 30, 2020, McCurry photographed the Union activity across the street from the Quickway facility again.

[19] McCurry replaced Chris Higgins as Respondent's Louisville terminal manager.

In October 2020, Respondent opened a new facility in Hebron, Kentucky, which is adjacent to the Greater Cincinnati airport, about a 2-hour drive from Louisville.

Events leading up to Respondent's closure of its Louisville operations

After unsuccessfully seeking voluntary recognition on January 22, 2020, Teamsters Local 89 filed a petition to represent Quickway's drivers on May 6, 2020, The Union won the Board mail-ballot election conducted between May 22 and June 19, 2020 by a vote of 25-17.[20] Respondent requested review of the election results on July 23, 2020. The Board denied the request for review on October 26, 2020, Jt. Exh. 7.

On October 27, 2020 Local 89 requested that Quickway provide dates for collective bargaining.

On November 19, 2020 Quickway and the Union had their first bargaining session. The parties reached several tentative agreements. There was no discussion of economic issues, such as wages. However, at some point, Union President Fred Zuckerman told the Quickway bargaining committee that he was "very adamant about the area standards." Tr. 501, 510. A second bargaining session was scheduled for December 10, 2020.

The events of December 6-10, 2020

On December 6, 2020, the Union held a meeting for its members. At this meeting, the members present voted to authorize a strike by Local 89 if necessary, R. Exh. 219. Business agents Brian Trafford and David Thornsberry told employees that if there was a strike, the picket line would be honored by Transerv and Zenith employees who were represented by Local 89, Tr. 923. Trafford testified that nothing was said about when a strike might occur or that it would occur on December 10. There is no evidence to the contrary in part because I did not allow Respondent to delve into matters of which it was not aware when it terminated its contract with Kroger.

Section 17.2 of Local 89's collective bargaining agreement with Transervice provides:

> It shall not be a violation of this Agreement, and it shall not be cause for discharge, disciplinary action or permanent replacement in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket lines at the Employer's places of business.
>
> It shall not be a violation of this Agreement and it shall not be cause for discharge, disciplinary action or permanent replacement if any employee refuses to perform any service which his/her Employer undertakes to perform as an ally of an Employer or person whose employees are on strike and which service, but for such strikes, would be performed by the employees of the Employer or person on strike.

R. Ex. 22.

[20] Quickway was obviously very surprised at this result, R. Exh. 71.

However, there is no evidence that any unit employee is **required** to honor a picket line. Indeed, Local 89's proposal to Respondent specifically stated that each employee had the right to determine as an individual whether he shall refuse to go through bona fide picket line, and no employee shall be disciplined or discharged for exercising this right.

R. Exh. 33, Article 23..

Strike benefits were authorized for Quickway employees if they went on strike and for Transerve and Zenith employees if they did not work due to their refusal to cross a Local 89 picket line.

On December 7, 2020, several television stations, WHAS11 and WDRB in Louisville received an anonymous text message. Andy Russell, an employee of WDRB advised Kroger that he could not "confirm whether the sender was involved with "the organization" just because of his email is an icloud.com email." The communication was almost certainly sent by Donald Hendricks, a former dispatcher for Quickway. It read:

> On October 26, 2020 truck drivers for Quickway Carriers, a contract carrier for Kroger grocery stores, located at 2827 S. English Station Rd., Louisville, KY had their majority vote to unionize with Teamsters local 89 as their representative was formally recognized. This was after a nearly a year of stalling and retaliatory practice implemented by Quickway Carriers against their employees.
> To date the company has not negotiated in good faith and today a strike authorization was held with a unanimous decision of drivers present to strike on December 10th, 2020 if the company does not concede to the drivers negotiations efforts.
> The next meeting between Teamsters Local 89, Drivers and company officials will be held at the Hilton Garden Inn 2735 Crittenden Dr. Louisville, KY starting at 0800 on December 10, 2020. At the conclusion of this meeting if company officials refuse to ratify a contract Quickway Carrier Truck Drivers in Louisville will strike.
> In recognition, the Teamsters Local 89 Truck Drivers and Warehousemen who work for Transervice and Zenith Logistics which are responsible for the majority of the Kroger Transportation and 100% of warehouse operations will also strike in support of Quickway Carrier drivers.
> **THIS WILL SHUT DOWN KROGER DISTRIBUTION OPERATIONS IN THEIR ENTIRETY.**

At least one TV station contacted Kroger about this message. Joe Obermeier,[21] Kroger's Vice-President of Supply Chain Operations then called Chris Cannon, Respondent's Vice President of Operations, about the message. There is no evidence that any news organization contacted the Union or when, or even if, the Union was aware of Hendrick's text messages.

At 4 p.m. Central time on December 7, 2020, Chris Cannon and Joe Campbell, President and Chief Operating Officer of Paladin Capital, participated in a conference call with representatives of Kroger and Eddie Byers, the Regional Manager for Zenith Logistics.

[21] Mr. Obermeier's name is mistranscribed as Overmeier at some places in the transcript.

According to Campbell, Daniel Vasser of Kroger asked Byers to reach out to the Local 89 business agent for Zenith to determine whether a reserve gate could be established for Quickway at the KDC. Byers did not testify in this proceeding and there is no credible evidence that either Zenith, Transerve, Kroger or Quickway seriously explored the possibility of establishing a reserve gate at KDC in order to avoid enmeshing Zenith, Transerve and Kroger in any strike that Local 89 might call against Quickway.[22]

In a December 7 or 8, conversation, Cannon and/or Prevost told Obermeier that if the Union insisted on the same terms that were contained in its collective bargaining agreement with Transerv, that would be a problem for Quickway.[23] In that event, Cannon stated Quickway might want to be relieved of its obligations under its contract with Kroger.

On December 8, 2020 Cannon asked Obermeier to cancel Kroger's contract with Quickway. Obermeier refused to do so, Tr. 373.

Obermeier told Cannon that Kroger would not cancel the contract and that it expected continued good service from Quickway. Ultimately, Kroger allowed Quickway to cancel its contract.[24]

Obermeier and Cannon also discussed whether Quickway would respond to Kroger's Request for Proposal for the contract term beginning in February 2021. Obermeier understood that a Paladin entity, other than Quickway, would respond to the RFP.

On December 9, 2009, Respondent resigned from its carrier services agreement with the Kroger supermarket chain at the Kentucky Distribution Center (KDC).[25] It then discharged or

[22] Chris Cannon testified that he discussed the possibly of a reserved gate with Quickway counsel Mike Osterle on the morning of December 7, Tr. 1764. Zenith appears to have established a reserve gate for Quickway drivers as of 11:00 p.m. on December 9, after Quickway's contract with Kroger had expired, Tr. 55.

I give no weight to the unsigned letter from Zenith counsel, A. Dennis Miller, dated December 9 for the proposition that attorney Miller discussed a strike with Local 89 business agent Trey McCutcheon. Miller did not testify. The letter is rank hearsay as I stated on the record at, Tr. 1819-20. Moreover, it does not indicate when Miller may have spoken to McCutcheon and says nothing about Zenith employees going on strike.

[23] It is possible that Obermeier was wrong about talking to Cannon on December 7. However, I credit his testimony that Cannon and/or Prevost told him that it would be a challenge for Quickway to agree to the same terms as were contained in L89's agreement with Transerve, Tr. 371-72. Cannon's testimony at Tr. 1879-83 is consistent with Obermeier's testimony. Cannon testified that the Transerve agreement did not fit Quickway's business model and that it was "a far stretch" from any collective bargaining agreement to which Quickway was a party.

[24] Respondent's witnesses contradicted Obermeier's testimony in several respects. I credit Obermeier since I see no incentive for him to fabricate his testimony and plenty of incentives for Respondent to contradict it. Moreover, the differences in the testimony of Obermeier and Respondent's witnesses are for the most part inconsequential. It is uncontroverted that the initiative for cancellation of Respondent's contract at the KDC came from Respondent, not Kroger.

If Obermeier told Prevost that Kroger would not renew its contract with Quickway, he did so after being informed that Quickway was seeking to get out of its current contract. Tr. 1332. .

[25] This agreement was effective on February 3, 2018 and was to expire in February 2021.

laid off the employees belonging to a bargaining unit of all full-time and regular part-time drivers at the KDC and the Versailles and Franklin, Kentucky sub-terminals.[26] Quickway continues to lease property at KDC. The vast majority of cabs Quickway used at Louisville were distributed to other Paladin affiliated terminals or sold if they were near the end of their shelf-life, R. Exh. 62.

Respondent met with the Union on December 10, 2020 at about 8:00 a.m.. Respondent offered to bargain about the effects of the closing of the Quickway operation at KDC; the Union refused. The Union insisted on continuing negotiations for a collective bargaining agreement; Respondent refused. At about noon several union business representatives picketed Quickway near the property it leased at the Kentucky State Fairgrounds. They also temporarily blocked 2 Quickway drivers from Indianapolis from leaving the Quickway facility at the Fairgrounds.

Teamster organizing activity in Indianapolis

Teamsters Local 135 conducted an organizing campaign of Quickway employees working at Kroger's Indianapolis terminal in 2019. A representation election was conducted in November 2019, which the Union lost. The Union did not file any unfair labor practice charges relating to this campaign.

On December 10, 2020, Quickway's Indianapolis terminal manager Eric Rowe dispatched 2 drivers to the KDC to pick up Quickway trailers. The drivers learned that Quickway had shut down its Louisville facility. Quickway employees at other terminals may have become aware of the shutdown, when vehicles used at Louisville were transferred to their terminals.

According to Lewis Johnston, a pro-union driver at Indianapolis, this knowledge put an end to plans by Indianapolis drivers to start another organizing campaign. Johnston testified that he told Rowe, who no longer works for Quickway, about the plans for a second union campaign prior to December 9. Rowe denies this conversation took place. Johnston's conversation with Rowe is not mentioned in Johnston's June 3, 2021 affidavit. Thus, I do not credit this testimony.

Respondent's version of the events leading to the closure of its operations in Louisville

According to Respondent, only 3 people were involved in the decision to cease its operations in Louisville: Paladin/Quickway CEO Bill Prevost, Joe Campbell, President and Chief Operating Officer of Paladin Capital and Quickway Chief Operating Officer Chris Cannon. Their version of events is that Respondent did not consider ceasing operations in Louisville until Kroger advised Respondent of an inquiry from Louisville television stations regarding a strike. Kroger forwarded to Respondent the emails it had received and quoted above indicating that Local 89 would strike Quickway, and that Transerv and Zenith employees would also strike and shut down the Kroger Kentucky Distribution Center.

Up until that time, according to Respondent, it intended to negotiate with Local 89 and reach a collective bargaining agreement. However, Respondent submits that unless it ceased

[26] The bargaining unit consisted of about 60-70 employees.

operations in Louisville, it would be liable for any damage to Kroger's business and this liability would ruin not only Quickway, but all of Paladin Capital.

Respondent made no effort to contact Local 89 about the alleged strike threat. Quickway counsel Mike Osterle contacted Local 89 President Fred Zuckerman on the morning of December 8, but did not inquire about a strike threat or the information Quickway had received from Kroger regarding media inquiries, G.C. Exh. 25. Instead Respondent made, according to its witnesses, a number of assumptions: 1) that Local 89 would go on strike on December 10; 2) that all Transerve and Zenith employees would go on strike and 3) that it would be responsible for hiring replacement workers for Transerve and Zenith and that it would be responsible for any damage to Kroger's business. Among the more radical assumptions testified to by Respondent witnesses are that they expected all drivers employed by Quickway and Transerve to pull off the road when the strike started which would allow the cargo to rot, that Respondent would lose its line of credit and insurance and that the consequences of a strike would ruin Paladin, as well as Quickway..

These assumptions were unwarranted and unreasonable for a number of reasons. The Transerv and Zenith collective bargaining agreements did not require unit employees to honor a picket line. Article 23 of the Transerve agreement provides:

> Each employee covered by this Agreement shall have the right to determine as an individual whether he shall refuse to go through [a] bona fide picket line, and no employee shall be disciplined or discharged for exercising this right.

R. Exh. 233.

Article 18.2 of the Zenith Agreement provides:

> It shall not be a violation of this Agreement, and it shall not be cause for discharge, disciplinary action or permanent replacement in the event an employee refuses to enter upon any property involve in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket lines at the Employer's places of business.
>
> It shall not be a violation of the Agreement and is shall not be cause for discharge, disciplinary action or permanent replacement if any employee refuses to perform any service which his/her Employer undertakes to perform as an ally of an Employer or person whose employees are on strike and such service, but for such strikes, would be performed by the employees of the Employer or person on strike.

R. Exh. 234.

There is no reason to assume that all Quickway employees, would have gone on strike had the Union gone on strike. They certainly weren't required to do so and only 25 of Quickway's 60 employees voted to be represented by the Union; 17 voted against such representation. Similarly, there is no evidence on which to assume that all or even a substantial number of Transerve or Zenith employees would have honored a Local 89 picket line.

Secondly, Respondent has not established that Transerve and Zenith could not have avoided the impact of a strike against Quickway by establishing a reserve gate. In June 2020, Respondent contemplated having product towed from the KDC to its English Station Road facility for loading onto its trucks. There is no evidence as to why this was not feasible in December or why Respondent did not explore it. Finally, Kroger was unconcerned that a Local 89 strike against Quickway would shut down the KDC, Tr. 429-31. Kroger would have found other avenues to ensure that its stores were serviced.

Whether or not Respondent decided to terminate its contract with Kroger prior to December 8, I infer that receipt of the media inquiry through Kroger presented Quickway with an opportunity to do what it preferred to do in any event; withdraw its recognition of the Union, terminate its contract with Kroger and lay-off all of its Louisville drivers. I infer that Respondent strongly desired not to have another unionized terminal and would have tolerated another one, if at all, only if Local 89 accepted a collective bargaining agreement such as it had in Lynchburg, Virginia, which did not contain the area standards that Local 89 was seeking.

Finally, no credible evidence in this record supports a conclusion that Quickway's departure from Louisville was necessarily permanent., Jt. Exh. 13.[27] The equipment needed to service KDC is still owned by a Paladin affiliate and Quickway continues to lease the property on English Station Road.

Analysis

The starting point for analysis of a plant closure is the U.S. Supreme Court decision in *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965). The Court held that closing an entire business does not violate the Act, even if done for discriminatory reasons. However, a partial closing may violate the Act if motivated by a desire to chill unionism in the remaining parts of the enterprise and if the employer may reasonably have foreseen that such closing would likely have that effect.

Darlington is distinguishable from the instant case in that the Board of directors of the parent company voted to liquidate the corporation and sell all the plant's machinery and equipment. In contrast, there is nothing necessarily permanent about Respondent's withdrawal from the Carrier Services Agreement with Kroger. Respondent did not liquidate anything-other than getting rid of some trailer cabs that were at the end of their shelf life. Much of this equipment was transferred to other Quickway or Paladin operations. There is nothing to prevent Respondent from bidding on the Louisville work again or for Kroger to award the Louisville work to it again, with or without a contract.

Finally, if Respondent took or were to take more permanent steps after December 9, 2020 that preclude its return to the KDC, that would be irrelevant to whether it violated the Act.

[27] On the basis of Obermeier's December 9, 2020 letter, Jt. Exh. 13, I discredit Bill Prevost's testimony that Obermeier told him that Kroger would not renew its Carrier Services Agreement with Quickway. Moreover, as demonstrated by its operations at Shelbyville, Respondent could have continued servicing the KDC without such a renewal, and even now could return to KDC without such a contract.

Whether its conduct violated the NLRA depends on the situation that existed on that date. Thus, the sublease of the English Station Road property is irrelevant to the resolution of this case.

Respondent's operation at Louisville was highly profitable. Respondent had hoped that with its business model it could capture the work currently done by Transervice. There is no evidence that Respondent has abandoned this goal. It still holds the lease on its Louisville property until 2024.[28] In the absence of a Board Order finding its December 2020 conduct illegal, there is substantial incentive for Respondent to return to Louisville without any obligation to honor its former employees' organizational rights.[29]

Despite the above, the holding in *Darlington*, which specifically allows an employer to close part of its business even if motivated by anti-union animus cannot be materially distinguished. Thus, I conclude Respondent's withdrawal from the Carrier Services Agreement did not violate the Act, *RAV Truck and Trailer Repairs, Inc. v. NLRB,* 997 F. 3d 314 (D.C. Cir. 2021).[30]

The Board addressed the "chilling effect" exception to the Darlington rule in *George Lithograph Co.,* 204 NLRB 431 (1973). There, the Board held that the General Counsel must only prove the foreseeability of a "chilling effect" on unionization and not necessarily that the partial closing had a "chilling effect:" on the remaining employees. She must also prove that the partial closing was motivated at least in part by a desire to chill unionization in any remaining part of its business, *Bruce Duncan Co., Inc.,* 233 NLRB 1243 (1977).

Respondent's withdrawal of recognition would most clearly have a chilling effect on employees at other Paladin companies considering unionization. However, I do not think the record is sufficient to establish that this was Respondent's motivation. This record only establishes Respondent's determination not to bargain with the Union in Louisville and a determination not to take chances on a strike by Local 89 if it failed to reach agreement with the Union.

Applying the test enunciated in *Wright Line* 250 NLRB 1083 (1980), were it not for *Darlington,* I would find that Respondent violated Section 8(3) and (1) by withdrawing its services from the KDC and laying off all its Louisville unit employees. Respondent knew of the

[28] Of lesser importance is the fact that Respondent did not terminate Jeff McCurry, its Louisville terminal manager, it merely reassigned him to other relatively near-by locations.

[29] This case is distinguishable from *First National Maintenance Corp v. NLRB*, 452 U.S. 666 (1981). In that case the employer closed part of its business because its contract with a nursing home was not profitable. That was not the situation in this case. Moreover, here the issues for which Respondent shut down its Louisville operation were amenable to resolution through the collective bargaining process. Respondent left Louisville due to a concern about higher labor costs. Finally, Respondent's decision was in large part motivated by anti-union animus.

[30] I conclude also that the Supreme Court decision in *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26 (1967) does not lead to a different result. First of all, I find that Respondent's withdrawal from Louisville was motivated by anti-union animus. However, under *Darlington* Respondent's conduct did not violate the Act despite its anti-union motivation and despite the fact that what it did is inherently destructive of the Section 7 rights not only of the Louisville employees, but also of the employees working for any of the Paladin affiliated companies.

employees' union activity, bore animus towards it[31] and took these actions to avoid bargaining further with the Union and to cease recognizing it as the authorized collective bargaining representative of these employees, *Century Air Freight,* 284 NLRB 730, 732 (1987).

Respondent does not even advance a non-discriminatory motive. Were it not for *Darlington,* I would also find that Respondent violated Section 8(a)(5) and (1) by not negotiating with the Union to impasse. Respondent did what it did to avoid collective bargaining, or even on the best interpretation of its motives, to avoid a perfectly legal strike. There is no credible evidence that Respondent could not have addressed its concerns through perfectly legal measures, such as establishing a reserve gate at KDC, having products ferried to its facility from the KDC and hiring replacements if there was a strike.

Section 8(a)(1) allegations covered by the September 2020 settlement agreement

As a general rule a settlement agreement with which the parties have complied bars subsequent litigation of the settlement conduct alleged to constitute unfair labor practices, *Hollywood Roosevelt Hotel Co.,* 235 NLRB 1397 (1978).. However, there is an exception to the settlement bar rule where the "prior violations were unknown to the General Counsel and not readily discoverable by investigation, *Leeward Nursing Home*, 278 NLRB 1058 (1986). Since I dismiss the allegations that led the Region to set aside the settlement, I must also dismiss the complaint allegations covered by the settlement. Nevertheless, in the event that I am reversed, I am setting forth my view as to whether the General Counsel would have otherwise established these violations.

Complaint paragraph 5(a)

Respondent, by Kerry Evola, violated Section 8(a)(1) as alleged in telling employees that Respondent would close the Louisville facility if they unionized. His comments meet the test for a statutory violation set forth in *Rossmore House*, 269 NLRB 1176 (1984)

Complaint paragraph 6(b)

Respondent, by Ed Marcelino, violated Section 8(a)(1) by asking Donald Hendricks to create a list of union supporters. Asking an employee for a list of union supporters violates Section 8(a)(1), *Key Electronics,* 167 NLRB 1104 (1967).

Complaint paragraph 7

Respondent, by Chris Higgins, violated Section 8(a)((1) by telling Warren Tooley that if employees unionized, Respondent would have to raise its prices and might lose Kroger as its main customer.

[31] As evidenced by its illegal surveillance of employees' union activities; unlawful interrogations, threats and hiring of a "union-buster" to thwart organization.

Complaint paragraph 8

Respondent, by Kerry Evola, violated Sections 8(a)(4) and (1) of the Act by indicating that he was going to sue Brent Wilson for filing a unfair labor practice charge alleging retaliation by Evola and suggesting that Wilson may need a lawyer.

Section 8(a)(1) allegations not covered by the settlement agreement

In determining whether or not an interrogation violates Section 8(a)(1) of the Act, the Board looks to whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The total circumstances of the conversation must be considered in determining whether any questioning was coercive in nature. See *Rossmore House*, 269 NLRB 1176 (1984).

I find that Jeff McCurry's questioning of employees on September 18, 2020 violated the Act. There is no evidence that McCurry interrogated only known union supporters. In fact, I infer he was talking to employees of whose sympathies he was unaware. Known union supporters were unlikely to provide him with the information he was seeking. The fact that the employees who spoke to McCurry disavowed interest in the Union is compelling evidence that his inquiries were coercive. Given the substantial number of employees who voted for union representation, it is highly likely that McCurry spoke to some of those employees, who gave him untruthful answers because they felt coerced.

This allegation was not plead as a violation by the General Counsel until September 15, 2021. Respondent submits that it has been prejudiced by the General Counsel's motion on that date to conform the evidence to the pleadings regarding this allegation. Section 102.17 of the Board's Rules give a judge wide discretion to grant or deny motions to amend complaints. The factors to be evaluated in determining whether an amendment should be allowed are (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated, *Stagehands Referral Service,* 347 NLRB 1167, 1171-72 (2006).

Respondent was not prejudiced by the General Counsel's motion to amend regarding these events on September 15, 2021, Tr. 650-53. The General Counsel stated that he had not moved to amend earlier because he was unaware of the instances until he received the subpoenaed documents. I granted the amendment but stated that if Respondent could demonstrate prejudice, I would reverse my ruling. Respondent called Jeff McCurry as a witness on September 17, 2021. Tr. 986. Respondent examined McCurry about the events of September 18, 2020, Tr. 1013-18. Respondent specifically questioned him about G.C. Exh. 35, in which McCurry indicated that he would find out what the union representatives were discussing with Quickway employees. Later, he stated that he had spoken to drivers about union activity. I have previously discredited McCurry's testimony that he only spoke to drivers who approached him. Respondent thus had amble evidence to introduce any exculpatory evidence.[32] Moreover, the violation is established by Respondent's documentation of the interrogations.

[32] .. The trial continued well into October.

Similarly, I find that Respondent violated the Act by Chris Cannon's approval of Lori Brown's documentation of employees' conversations about the Union in March 2020 and his encouragement for her to continue doing so. The General Counsel moved to amend the pleadings to conform to the evidence with regard to this conduct as well. G.C. Exh. 22. This establishes an 8(a)(1) violation on its face and was introduced into the record on September 13, 2021, Tr. 282-83. Respondent objected to the introduction of the document only on relevance grounds. Immediately after receipt of the document into the record, the General Counsel called Chris Cannon as an adverse witness. Respondent called Cannon as its witness on October 28, 2021, Tr 1695. This was a month and a half after the General Counsel moved to amend the pleadings to allege that Cannon had violated the Act by engaging in surveillance on March 18, 2020, Tr. 650.- 53. Thus, Respondent had ample opportunity to elicit evidence to show that Cannon did not violate the Act as alleged.

These violations were fully litigated, *Williams Pipeline Co.,* 315 NLRB 630 (1994); *Casino Ready Mix, Inc. v. NLRB,* 321 F.3d 1190, 2000 (D.C. Cir. 2003). Thus, Respondent suffered no prejudice by virtue of the motion to conform the pleadings. Given the circumstances, I conclude that whether or not the General Counsel could have plead these violations earlier is immaterial.

The March 2020 and September 18, 2020 allegations are not covered by the settlement bar rule

While the above 2 allegations were not covered by the September 2020 settlement agreement, neither would have come to light had not the Region set aside the settlement agreement. I do not find this to be a reason for precluding a finding that Respondent violated the Act as alleged. This is particularly so since Respondent appears to have a penchant for spying on employees' union activities. It did so, as found by the Board in the Landover, Maryland case, a matter that also involved Chris Cannon and in Indianapolis as well as in Louisville.

Conclusions of Law

Respondent, by Jeff McCurry violated the Act on September 18, 2020 by interrogating employees about their union activities.

Respondent, by Chris Cannon, in March 2020 violated Section 8(a)(1) by condoning prior surveillance of employees' union activities and sanctioning further surveillance

Respondent did not violate the Act in any other respect alleged by the General Counsel.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Order

Respondent, Quickway Transportation, Inc., Nashville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities.

(b) Engaging in the surveillance of employees' union activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, Respondent shall duplicate and mail, to all current employees and former employees employed by the Respondent in or related to its Louisville, Kentucky operations on December 9, 2020, at its own expense, a copy of the attached notice marked "Appendix." on forms provided by the Regional Director for Region 9. It shall be mailed after being signed by the Respondent's authorized representative.[33]

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 4, 2022

Arthur J. Amchan

Arthur J. Amchan
Administrative Law Judge

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your union activities or the union activities of other employees.

WE WILL NOT engage in surveillance of your union activities or create the impression that we are doing so.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

QUICKWAY TRANSPORTATION, INC.
(Employer)

]

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

550 Main Street, Federal Building, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-251857 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THECOMPLIANCE OFFICER, (513) 684-3750.